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UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

LEGAL ASPECTS OF FINANCIAL SHIP LEASING IN DEVELOPING COUNTRIES

Preliminary study

Report by the UNCTAD secretariat

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INTRODUCTION

1. The Standing Committee on Developing Services Sectors: Fostering Competitive Services Sectors in Developing Countries - Shipping, at its first period of sessions in November 1992, requested the UNCTAD secretariat to "analyse legal aspects of ship leasing in developing countries, including problems faced by these countries" (TD/B/CN.4/13, p. 16, para. 13).

2. This report has been prepared in response to that request. In order to obtain the necessary information, questionnaires were sent to the Governments of developing countries and through them to the commercial parties involved, requesting information concerning the viability of the system and existing legislation. Information was also requested of financial bodies and lawyers' firms specialized in ship finance. At a regional meeting held in Santiago de Chile (19-27 October 1994), jointly organized by the UNCTAD secretariat and BIMCO (Baltic and International Maritime Council) on ship financing and chartering policies, additional information was obtained from the speakers' papers and ensuing discussions.

3. The report prepared in 1991 by the UNCTAD secretariat on "Container Ship Leasing" (TD/B/C.4/339) stated in one of its conclusions 1/ that utilization of the leasing concept in developing countries was not common and had been inhibited by a number of factors including:

(a) Legal factors (e.g. the legal system of the developing country may not recognize the special nature of the modern equipment lease and may treat the lease as a traditional rental of property, thus placing inappropriate responsibility on the lessor);

(b) Tax or revenue factors (e.g. the tax system of either the lessee's or the lessor's home country may not allow the lessor to take sufficient advantage of the tax benefits of equipment ownership);

(c) Practical factors (e.g. the lessor may perceive a high risk in terms of his ability to inspect or repossess the leased property in a developing country);

(d) Contractual factors (e.g. the terms of the typical financial lease provide that the user or lessee may not cancel the lease and thus all risk as to the suitability of the leased property is borne by the lessee).

4. To these factors the report added the fact that in many developing countries this method of financing did not yet appear to be well known or understood.

5. Similarly, the UNCTAD secretariat's 1992 report on "Ship Finance for Developing Countries" (UNCTAD/SHIP/642), after mentioning the convenience of this type of finance for developing countries due to the fact that it required practically no initial financial outlay, concluded by saying that it was perhaps not used in developing countries owing to the absence there of a suitable legal framework to facilitate this type of finance. The report

suggests that it might be advisable to introduce suitable changes in the legislation of developing countries in order to facilitate ship leasing. 2/ This preliminary report is complementary to those earlier reports and therefore does not go into the genesis or operation of financial ship leasing, or into the advantages and drawbacks of the system, risk problems, or any other themes already dealt with.

6. The UNCTAD secretariat would like to thank all the financial entities and specialized lawyers who supplied valuable information for the preparation of this report.

SUMMARY AND CONCLUSIONS

7. While the financial leasing contract as such is not regulated in most legal systems, its fiscal effects have been regulated in most of the developed countries. This lack of positive regulation is offset by the wide distribution of standard leases. 3/ These standard leases cannot, however, make up in practice for the absence of legislation with respect to taxation, registration or bankruptcy, to mention but a few examples.

8. It appears from the replies received to the questionnaire prepared by the UNCTAD secretariat that many developing countries have not planned any form of financial leasing legislation, and have no experience in the leasing of ships. One group of developing countries 4/ recently adopted ministerial resolutions specifically recognizing that it would be useful for those countries to adopt common legislation to facilitate financial ship leasing. Another group of countries have only fragmented leasing legislation, difficult to apply to ship leasing and of doubtful effect.

9. On the basis of these replies, and the information obtained through other channels, especially the comments made by financial institutions in developed countries, the UNCTAD secretariat suggests that a series of legislative measures should be adopted in order to promote financial ship leasing in developing countries. The proposed measures would tend to make it more attractive from the economic point of view through favourable tax legislation. It is also important that national legislations should ensure the legal security of the ship lessor - usually established in a developed country - who is interested not in operating the ship for its own account, but in allowing a third party to do so. In this respect it is suggested: (i) that a modern and efficient ship registration system be established, which, amongst others, would allow the lessor the option of registering the leasing contract in a public registry, so as to be able to make it effective against third parties; (ii) that the lessor, in the event of a suspension of payments, insolvency or bankruptcy on the part of the lessee, should be allowed to recover possession of the ship, with the effect that the latter would not be considered part of the bankruptcy assets; and lastly, (iii) that in cases of financial leasing, the exemption from liability of the lessor should be recognized for hidden defects of the ship, with a very few limited exceptions.

10. Lastly, it is suggested that the UNCTAD secretariat should continue its study of the problems of financial ship leasing in developing countries in two ways: (i) by disseminating or promoting the concept, (ii) by preparing model legislation for consideration by developing countries wishing to introduce that type of leasing.

Chapter I

CONCEPT AND DEFINITION OF FINANCIAL LEASING

11. The leasing contract generally comes in two forms:

(a) Financial leasing, which is a form of lease with an option to purchase and where lease payments may be considered as payment for the cost of the ship, and

(b) Operating leasing, which is usually used on a relatively short-term basis and where the lessee acts as if the ship were his own. In this case, the lease payments do not entail amortization of the leased equipment.

12. Many legislations of developing countries do not have any special regulation for financial leasing contracts and they include such cases in general leasing rules, without considering that type of contract as a separate case. There are also different descriptive definitions of financial leasing, which vary according to the legal system to which they refer. Thus, while in some countries the financial leasing contract must necessarily include a purchase option on expiry, in favour of the user or lessee, in other countries this purchase option implies that the contract will be considered as an instalment sale rather than a financial lease. 5/

13. Financial leasing is normally long-term leasing, where the lessee is not entitled to cancel the contract. Moreover, a financial lease is usually fully amortized ("full-payout lease"), since the lease hire is calculated to cover the cost of the purchase of the leased equipment, any additional expenses incurred by the lessor, and part of his profit. 6/ Financial leasing transactions usually have the following characteristics: 7/

(a) The equipment is for business or professional purposes;

(b) The specifications and choice of the equipment lie with the lessee;

(c) The supplier of the equipment purchased by the lessor is selected by the user or lessee;

(d) The lessor remains the owner of the equipment;

(e) The risks usually borne by an owner of equipment are transferred to the user (employment, destruction, impairment, etc.);

(f) Any remedies of the lessor arising out of imperfect performance of the supply contract are assigned to the user or lessee; and

(g) In return for this assignment, claims by the user or lessee against the owner (lessor) resulting from defects of the equipment are contractually excluded.

14. Sometimes parties agree upon:

(a) A purchase option for the lessee at the end of the lease;

(b) A sharing of the proceeds of a sale of the leased equipment after the lease has expired; or

(c) An extension of the lease on more favourable terms after expiry of the original lease.

15. From a legal point of view, the right of either party to cancel the lease is normally considered as a characteristic of an operating lease, as opposed to a financial lease. Another characteristic which distinguishes the former from the financial lease is that usually the property concerned in the operating lease is not purchased by the lessor according to the lessee's specifications.

16. Since in practice any ship leasing usually implies a "bareboat charter", whether or not a lease is "financial" or "operational" will depend on whether the contract includes non-cancellation clauses, generally known as "hell or high water clauses". 8/ If such clauses are included, it may be assumed that the lease contract is financial, while the absence of such a clause would indicate that it is an ordinary operating lease. 9/

Chapter II

USE OF FINANCIAL SHIP LEASING IN DEVELOPING COUNTRIES

17. The replies received by the UNCTAD secretariat indicate that financial ship leasing is rarely used in most developing countries. A few of these, however, especially those of the Andean Group (Bolivia, Colombia, Ecuador, Peru and Venezuela), have recognized its usefulness as a valid alternative for acquiring ships for shipping companies in the subregion. The Andean Group, through the mechanisms of the Cartagena Agreement Council, is preparing draft regulations to cover leasing with purchase option for ships used by shipping companies in the subregion. 10/

18. According to leasing companies, which are usually established in the developed countries, the more significant drawbacks of ship leasing include the risks inherent in the registered ownership of the ship. They are particularly concerned regarding their joint liability for environmental risks due to maritime pollution. 11/ United States legislation on maritime pollution, known as OPA 1990 (1990 Oil Pollution Act), is frequently referred to in the replies received by the secretariat. This act establishes joint liability of a ship's lessor and lessee for damage due to oil pollution. 12/ This liability, assumed by the lessor against his will, may be offset by appropriate insurance cover 13/ during the leasing period, as appears to be always required under ship leasing contracts. 14/ In some cases, however, the risk coverage is either difficult to obtain or extremely costly, since the liability established under that act is practically unlimited. It is also worth bearing in mind that insurance cover usually does not cover all the risks inherent in leasing. One important example of exclusion is claims arising from the contractual liability of the lessee, which are normally not covered by Protection and Indemnity insurance.

19. The replies received also indicate other factors which inhibit ship leasing in developing countries. Reasons include the absence of any rules governing the register of ships, as well as the lack of any protection for the lessor in bankruptcy proceedings, and with regard to dispossession for defects of the ship or hidden defects.

Chapter III

LEGAL MEASURES TO FACILITATE FINANCIAL SHIP LEASING IN DEVELOPING COUNTRIES

1. Tax measures

20. Both those authors who have dealt with the concept of financial leasing and the replies received to the questionnaire from UNCTAD's Secretariat concurred as to the importance of extending favourable tax treatment to this type of financing. A number of the replies received, and at least one author, 15/ even doubted whether financial leasing could continue to exist if tax benefits disappeared. Leasing has evolved in developing countries thanks to the direct relationship between the use of this type of financing and the tax benefits it enjoys. In principle, the law may regulate the manner in which the lessee shipping company - which is based in a developing country - treats the periodic rentals it has agreed to pay to the lessor and owner of the vessel in three ways:

(a) It may treat the payments as expenditure, in which case the lessee may charge the rentals against the earnings of the financial year in which they are due (operating lease), thereby reducing its annual profit and consequently the income tax due.

(b) It may debit the periodic rentals due each financial year from an asset account (financial leasing). This avoids having to reduce the lessee's profits by the amount of the rentals it has to pay, thereby also improving the lessee's creditworthiness when it comes to obtaining fresh financing for other purposes, taking on new liabilities or entering into new contracts. In this variant, when the lessee takes up his purchase option, and the option comes into effect, making the lessee the owner of the property, the residual amount it would have to pay will also be debited from the same asset account.

(c) A third possibility, and probably the most advisable, is to permit the lessee to choose the most suitable of the above alternatives. The law may also introduce a number of variants based on any of the above options.

21. Since virtually all ship-leasing contracts in the developing countries are with foreign lessors, it is important that the tax treatment given to value added tax and income tax, 16/ which will finally be borne by the lessee shipping company, does not cancel out the benefits of this type of financing. 17/

22. Another important consideration is the tax treatment of the transfer of ownership of ships in a financial leasing arrangement. Although some countries exempt the transfer of ships and aircraft from any form of tax, many countries levy property transfer tax on the transfer of property. It is important for countries that wish to levy some form of tax to adopt as the tax base the residual value agreed upon, rather than the value of the newly-built vessel or the amount of the periodic rentals paid in the course of the financial leasing contract plus the residual amount agreed upon. 18/ In this case, the tax benefit is enjoyed directly by the lessee of the vessel, and indirectly by the lessor, the leasing company, a factor which encourages this type of financing.

2. Establishment of suitable legal norms to regulate the shipping register

23. Since the fundamental characteristic of ship leasing is the fact that the lessor retains ownership of the vessel until such time as the lessee takes up the purchase option, it is important for the lessor duly to secure its ownership. Consequently, a proper shipping register must be kept to permit those States that wish to do so to offer the possibility of registering bareboat charter or a temporary change of flag. In this connection, it may be pointed out that many financial leasing operations involve a temporary change of the vessel's flag. This practice is provided for under the Standard Bareboat Charter "BARECON 89", drawn up by the Baltic and International Maritime Conference (BIMCO), paragraph V (optional).

24. Articles 11 and 12 of the 1986 United Nations Convention on Conditions for Registration of Ships specifically provides for the possibility of a vessel temporarily flying another flag, and article 16 of the International Convention on Maritime Liens and Mortgages, 1993 lays down rules for the increasingly common practice of authorizing the temporary suspension of the flag of ships registered in the national registers, when they are bareboat-leased to a foreign lessee. The Convention stipulates that in this case it is the legislation of the State of registration that is determinative for the purpose of recognition of registered mortgages, "hypothèques" and charges, and also provides for a system of cross references and information between the State of registration and the flag State.

25. A striking example of the importance of a proper shipping register for developing countries that wish to foster the financial leasing of ships as a means of financing is to be found in the draft decision on the Andean shipping register, proposed to the Cartagena Agreement Commission. 19/ The draft, which is intended to encourage the purchase of vessels and the development of the merchant marine of the member countries in the subregion provides, inter alia, for the registration of ships on bareboat charter.

3. Public notice of the leasing contract

26. The characteristic of the leasing contract is that it transfers to the lessee full possession and use of the ship (its commercial and nautical management), thereby making the lessee the ship operator (the person who operates the ship and assumes the risks and results of its operation), completely and totally disassociating the owner from its operation. The leasing contract will be effective with regard to third parties, as the owner will be held harmless for claims arising out of the ship's operation, from the moment he ceases to be the ship's operator by virtue of the contract. 20/ There are a number of exceptions to this general principle, which indirectly engage the responsibility of the owner towards third parties, even though the claims in question arise from the ship's operation, and are consequently the sole responsibility of the lessee:

(a) First, the so-called "maritime claims" whether preferred or not. These are claims that may be enforced against the ship, regardless of against whom they are made. 21/ In some cases, certain maritime claims that were

entered into by the lessee are also secured by a "maritime lien" enforceable in rem on the ship, 22/ which will not be extinguished by a change of ownership, registration or flag.

(b) Under a number of international conventions and national laws, the registered owner of the ship is responsible for some types of claims, regardless of any lease. Most of the answers to the questionnaire received concur that it is precisely this responsibility - which is absolute in the case of damage caused by pollution - which is the major concern of shipowners leasing out vessels, 23/ and which in many cases reduces the attractiveness of leasing as a commercial activity.

(c) Claims against the lessor of the ship arising out of its operation, other than those described in subparagraphs (a) and (b).

27. It is precisely this third category of claims that offers some room for manoeuvre to States that wish to allow the much sought-after legal protection of the lessor of the ship against third parties. It would thus seem advisable to offer the possibility of registering the ship-leasing contract in a public register - possibly the ordinary shipping register - thereby formally publicizing it to third parties. This is in line with the clauses of the standard bareboat charters which require material publicity by the lessee. 24/

28. In this respect, French law, whose Act of 3 January 1967 relating to the "legal status of vessels" requires leasing contracts of over one year to be put down in writing, sets an interesting precedent. Under article 91 of the Decree of 27 October 1967, such contracts must subsequently be recorded under the entry for the vessel kept by the customs office, thereby fully publicizing the contract, which is necessary to make it effective against third parties. 25/

29. Until this possibility of formal registration and public notice has been accepted, the shipowner will run the risk of being held responsible for claims resulting from the operation of the vessel, for which the lessee is in principle alone responsible. 26/ This accounts for the contractual provision in standard bareboat charter, giving a right of recovery or compensation for the owner against the lessee, either if the vessel is seized or arrested (actions in rem), or if the owner has been compelled to assume responsibilities pertaining to the lessee operator. 27/

4. Protective measures in bankruptcy proceedings

30. Several replies to the UNCTAD secretariat's questionnaire point to the practical difficulty facing a mortgagee who wishes to foreclose a mortgage against an encumbered ship. This difficulty is seen as a major hurdle, particularly when the ship's State of registration is not a party to the 1926 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages. 28/ It is felt that one of the advantages deriving from the financial leasing of ships is precisely that the ownership of the ship is not transferred during the duration of the ship-leasing contract, as a result of which in the case of default by the lessee, the lessor is in principle able to recover the ship without the need for lengthy and costly legal proceedings. 29/

31. In order to protect the lessor from the possibility of the lessee's bankruptcy, it is important for national legislation to permit the lessor to recover possession of the ship if the bankrupt debtor (the lessee) is unable to provide adequate security for the lessor's interests. This implies that in the case of bankruptcy the lessor will be able to exercise "separatio ex iure dominio" in order to remove the ship from the bankrupt estate. 30/

32. It is worth mentioning at this point that although article 7 of the 1988 UNIDROIT Convention on International Financial Leasing 31/ expressly recognizes the lessor's rights against the lessee's creditors and determines that the applicable law shall be that of the State in which the ship is registered - the State of registration - paragraph 5 of the article voids the protection, in so far as it stipulates that the latter is subordinate to any right of arrest, detention or disposition, which has been conferred specifically in relation to the ship, under the law applicable by virtue of the rules of private international law.

33. Although clearly the lessor will be unable to protect himself if the bankrupt's creditors also hold a maritime lien or claim authorizing the arrest and compulsory sale of the ship - regardless of the fact that the lessor as shipowner is not personally their debtor - in all other cases there is a need for a rule permitting the withdrawal of the ship from the bankruptcy assets. 32/

5. Responsibility of the lessor with regard to a dispossession action

34. Financial ship leasing operations generally involve three parties: the lessor, the lessee and the builder or seller of ships, who is generally chosen by the lessee. Consequently, the legal aspect of financial ship leasing involves two distinct contracts: the contract for the building or sale agreed upon by the lessor and the shipyard or seller, and the leasing contract between the lessor and the lessee. From the legal angle, although each contract is independent of the other, this does not preclude a connection between them, particularly as regards the technical characteristics of the vessel, which enter into both contracts. 33/ Thus, as a general rule, all financial ship leasing contracts stipulate that the lessor is in no way responsible for any defects or for function or fitness for any particular purpose of the vessel. This is so because although the lessor orders and purchases the ship, it is chosen by the lessee, who also approves the plans and supervises the construction if it is a new ship. The lessee chooses the shipyard in which the ship is to be built and the lessor merely finances its construction. 34/

35. Although most European countries' legislation holds financial-leasing companies harmless, 35/ the absence of legislation on financial leasing in many developing countries means that this is not necessarily the case there. 36/

36. Article 8 of the 1988 UNIDROIT Convention on International Financial Leasing also absolves the lessor from any liability. This principle is mitigated by a number of exceptions designed to protect on the one hand the lessee and on the other the supplier. Thus, in its article 8 (i) (a) the Convention stipulates that the lessor is liable to the extent that the lessee has suffered loss as the result of its reliance on the lessor's skill and

judgement and of the lessor's intervention in the selection of the supplier or the specifications of the equipment. In addition, although article 12 (i) (a) recognizes the right of the lessee as against the lessor to reject the equipment or to terminate the leasing agreement - in conformity with the terms of paragraph 4 of the article - he is only able to take such action if the failure to deliver, late delivery or delivery of equipment that fails to conform to the supply agreement are attributable to an act or omission on the part of the lessor. Article 10 (i) of the Convention stipulates that the duties of the supplier under the supply agreement 37/ shall also be owed to the lessee as if it were a party to that agreement and as if the equipment were to be supplied directly to the lessee. The same article also specifies that the supplier shall not be liable to both the lessor and the lessee in respect of the same damage.

37. The provisions of the Convention regarding the exemption from liability of the lessor for defects in the leased equipment, and direct action by the lessee against the supplier in cases of financial leasing provide an alternative solution to the problem that no doubt merits more careful thought, and their adaption to the specific business of ship leasing.

Notes

1/ TD/B/C.4/339, p. 8.

2/ UNCTAD/SHIP/642, pp. 21 and 22.

3/ BARECON 89; "HADAKA" policy (Japan Shipping Exchange Inc.); SHELLDEMISE; ITALSCAFO.

4/ Andean Group: Bolivia, Colombia, Ecuador, Peru and Venezuela.

5/ See article 1 of the 1988 UNIDROIT Convention on International Financial Leasing, which describes the characteristics of this type of leasing.

6/ Arroyo considers a financial lease as a contract by virtue of which one party temporarily (normally for a period between 10 and 20 years) grants the other party the right to peaceful use of a property (ship) with an option to purchase in return for a rental. It is a mixed contract for the lease of property (ship in bareboat condition, neither commissioned nor equipped) plus an option to purchase. The lessor is a leasing company or financier, which is interested not in exploiting the ship on its own account, but in granting that right to a third party, namely the ship operating company. "Shipbuilding and Financial Leasing", UNCTAD/BIMCO Symposium on Ship Financing and Charter Policies, Santiago de Chile, 19-27 October 1994.

7/ Analysis of Equipment Leasing Contracts, op. cit., p. 6, and Report by the UNCTAD secretariat of Financial Ship Leasing, p. 16.

8/ Such clauses imply that the bareboat hire will continue to be paid and may be waived only in two cases: if the lessor is compensated by its insurance in the case of total loss of the ship and at the time the established lease period expires. G.V. Ryan, comments on C.P. Barrington, "Leasing for European Shipowners: Shipowners and Bankers in Leasing", Seatrade publication, 1973, p. 65.

9/ On the differences between financial leasing and operating leasing of ships, see Roger Heward, "Seminar on Bareboat Charter Parties: Bareboat Charter for Trading Vessels", CMI, Knokke-Zoute, April 1989, p. 85 et seq.

10/ Resolution V-50 of the Andean Committee of Water Transport Authorities, "Fomento a las marinas mercantes del Grupo Andino", of 4 November 1994.

11/ The International Convention on Civil Liability for Oil Pollution Damage (art. 3 (1)), as amended by the 1984 Protocol (art. 4 (2)), expressly attributes liability for oil pollution damage to the registered shipowner, regardless of who the ship operator may be.

12/ Under OPA rules, any tanker entering the United States after 28 December 1994 must maintain evidence of financial responsibility for the ship in the fleet with the highest tonnage multiplied by $1,500 per gross ton. Ships failing to meet this requirement may not enter the United States, or if they do so will be subject to embargo or seizure of the ship. Under this law, the party defined as "responsible" for an oil spillage is jointly and severally liable for all damage caused by the spillage, regardless of whether it is to blame or not. The law defines the "responsible party" as the owner, operator or "demise charterer" of a ship or facility. Neither the wording of the act nor its legal precedents throw any further light on the meaning of these terms, nor have they been interpreted by any case law. It is considered, nevertheless, that the term "owner" refers to the ship-registry owner and that the term "demise charterer" refers to the bareboat charterer, who has absolute control over the crew and ship. See Juan Anduiza: "Responsabilidad del Fletador Ante la Ley Ambiental Estadounidense OPA 1990 - Certificado de Responsabilidad Financiera", UNCTAD/BIMCO Symposium on Ship Financing and Charter Party, Santiago de Chile, 19-27 October 1994.

13/ The registered owner of an oil tanker - transporting oil or bulk shipments - even though he is not operating the vessel, requires liability insurance for any pollution the ship might produce. The need to insure also arises for the lessee of the vessel, in so far as the owner may pass on a claim against him, if the damage is due to the lessee's fault or negligence, once the owner has settled the damage caused by the pollution. Furthermore, the insurance company may exercise its right of subrogation once it has compensated the insured party or the third party affected (art. 3 (5) of the 1969 Convention). In practice, the owner normally requires the lessee of the vessel to take out liability insurance for oil pollution protecting the interests of both parties, thus avoiding both the need for two insurances with separate premiums for the same risk, and especially the effects of subrogation and recourse against the ship's lessee. M. Clavero, "Clubs de P & I", European Institute of Maritime Studies, Madrid 1992, p. 202.

14/ Clause 12 of the BARECON 89 policy stipulates that during the leasing period, the Lessee shall maintain the ship insured at its expense against marine, war and Protection and Indemnity risks in a form approved by the owner in writing. Clause 14 of the SHELLDEMISE policy, expressly drafted for the leasing of oil tankers, establishes that during the period of lease, the ship shall remain insured by the lessees and at their expense against marine, war and Protection and Indemnity risks ... such insurance shall be taken out by the lessee to protect the interests of both owners and lessees.

15/ Arroyo. "Construcciones navales y arrendamiento financiero", UNCTAD/BIMCO Symposium on Ship Financing and Charter Party, Santiago, Chile, 19-27 October 1994.

16/ Peruvian legislation has maintained - in principle until 31 December 2000 - income tax exemption for rentals. However, exemption from value added tax on rentals, initially included in legislative decree 299, has been abolished.

17/ Hernández Berenguel: "Arrendamiento Financiero de Buques", UNCTAD/BIMCO Symposium on Ship Financing and Charter Party, Santiago, Chile, 19-27 October 1994.

18/ Article 4 of Ecuador's Commercial Leasing Act (Decree 3121 of 22 December 1978 - R O No. 645, 5 January 1979) stipulates that if the lessee takes up his option to purchase for the residual cost, this will be taken as the tax base for calculating any government or municipal taxes due on the transfer of ownership.

19/ Final Act of the Fifth Extraordinary Meeting of the Andean Committee of Water Transport Authorities. Document JUN/R CAATA/V-E/Final Act of 3 June 1993, pp. 13 et seq.

20/ Carlon: "Naturaleza y disciplina del contrato de arrendamiento de buque", RDM 1969, p. 27.

21/ Under the 1952 International Convention relating to the Arrest of Seagoing Ships, the ship from which the "maritime claim" arises may always be arrested by the claimant regardless of whether its owner is the debtor.

22/ See article 2 of the 1926 International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages.

23/ See article 3 (1) of the International Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage. See, also, David W. Abecassis: Oil Pollution from Ships: Persons Liable and Exempt from Liability (Butterworths, London, 1978), pp. 176-178.

24/ See clause 15 of BIMCO's "Standard Bareboat Charter: 'BARECON 89'".

25/ René Rodière: "Droit Maritime: Le navire", (Dalloz, Paris, 1980), Chapter VII, pp. 211 et seq. See, too, article 60 of the General Regulations of the Bolivian Merchant Navy, chapter VI, "Contracts relating to the use of vessels", which stipulates that contracts for the hire of vessels must be set down in writing and, in order for them to be invoked by third parties, be registered with the National Ship Registry and entered in the ship's certificate of registration. Turkish legislation also requires ship leasing contracts to be registered with the Register of Shipping (Act No. 3226 on Financial Leasing of June 1985). Article 93 of the Act on Maritime Navigation under the Swiss flag, of 23 September 1953, stipulates that if the ship-leasing contract has not been registered in the Swiss shipping register, the owner is responsible, as shipowner, in relation to any third party who has not been informed of the leasing arrangement.

26/ See Rodríguez Carrion: "Contrato de Arrendamiento de Buques: Efectos del contrato frente a terceros; Problemática de la publicidad del contrato". This author emphasizes the need for the leasing contract to be duly registered in order for it to be invoked against third parties, thereby protecting the owner-lessor of the ship. Anuario de Derecho Marítimo, Vol. III, Government of the Basque Autonomous Region, 1981. Lefebvre-Pescatore: "Manuale di Diritto della Navigazione", 1953, takes the view that where contractual responsibility is concerned, there is no need for the ship to be really encumbered in respect of a maritime claim, once it is known, through a system of legal publicity, at the time of entering into the contract that the contract is with a ship operator who is not the owner.

27/ J.M. Ruiz Soroa: "Manual de Derecho del Transporte Marítimo: el arrendamiento y los terceros", Government of the Basque Autonomous Region, 1986, pp. 41-43.

28/ The following developing countries are parties to the Convention: Argentina, Cuba, Brazil, Algeria, Uruguay, Lebanon, Zaire, Iran, Syria and Madagascar. "Conventions de Droit Maritime", Ministère des Affaires étrangères, du commerce extérieur et de la coopération au développement of Belgium, 24 May 1994.

29/ Regarding the practice of financial leasing companies that have taken out a first mortgage on the ship, in order to secure their interest therein to the exclusion of claims secured by a maritime lien, see Richard B. Barnett: "Protection of Lessors: Problems for the lessor arising out of financial difficulties of user". Colloquium on Protection Against Insolvency in Maritime Law, CMI Preliminary Papers, Tulane, 1987, pp. 79 and 80.

30/ See, María-José Morillas Jarillo: "Algunos aspectos del leasing de aeronaves en España", RDM No. 208, Madrid, 1993, p. 505.

31/ This Convention will come into force on 1 May 1995, when the three instruments of ratification, acceptance, approval or accession required by its article 16, have been deposited. As of 13 February 1995, the following States were parties to the Convention: France, Italy and Nigeria.

32/ Article 9 of the Ecuador's Act on Commercial Leasing, op. cit., stipulates that in case of suspension of payments, insolvency or bankruptcy on the part of anyone possessing goods under commercial leasing, the lessor may recover them in conformity with the procedure laid down by the relevant Decree (No. 3121, of 22 December 1978). Consequently, the assets will not form part of the bankrupt estate, nor may they be included in a settlement. Similarly, article 11 of Peru's Legislative Decree No. 299 of 26 July 1984 stipulates as follows: "property that is leased may not be arrested, encumbered or charged by an administrative or judicial order against the lessee. The judge must annul any precautionary measure over such assets subject to the sole requirement of presentation of the proof of the public instrument relating to the financial leasing. No appeal may be made until the asset has been released and handed over to the lessor".

33/ See, Ignacio Arroyo: "Construcciones Navales y Arrendamiento Financiero", UNCTAD/BIMCO Symposium on Ship Financing and Charter Party, Santiago, Chile, 19-27 October 1994.

34/ See, "Container Ship Leasing: lessor's obligation to deliver the vessel", TD/B/C.4/339, pp. 18 and 19.

35/ See, María-José Morillas Jarillo, op. cit., p. 537.

36/ The legislation on commercial leasing of a number of developing countries, such as Ecuador (Decree No. 31212 of 22 December 1978; R O No. 745 of 5 January 1979), stipulates that "unless otherwise agreed, the commercial lessor shall not be liable to the lessee for dispossession or for hidden defects of the object of the lease. In this case, the right of the lessee to claim possession with respect to third parties, particularly manufacturers and suppliers, is recognized" (art. 6). Similarly, article 5 of Peru's Legislative Decree No. 299 of 26 July 1984 on financial leasing stipulates that "the lessor is not responsible for defects and damage to the goods, responsibility for taking the appropriate actions against the supplier lying with the lessee".

37/ Arroyo, op. cit., p. 5, describes the contract for the construction of the ship as "a contract of work by an enterprise", as the shipyard undertakes to produce a result involving the performance of a work in compliance with the principal's orders.